

Counsel for Complainer (Reclaimer)—Rhind—  
Gunn. Agent—Party.

Counsel for Respondents—Salvesen. Agent—  
William Paterson, Solicitor.

Tuesday, May 19.

## SECOND DIVISION.

[Sheriff of Argyleshire.

M'PHERSON v. WRIGHT AND SINCLAIR.

*Bill of Exchange—Noting—Protest—Discon-  
formity of Date—Arrestment.*

Where a dishonoured bill bore to be noted on 24th September and the protest was dated the 25th, held that the protest, being disconform to the noting, was invalid, and ineffectual as a foundation of diligence.

*Retention—Bank—Cautionary Obligation of a  
Bank Agent for Overdrawn Account of Cus-  
tomer—Arrestment.*

A bank agent owed a tradesman a sum of money for goods supplied to his family. The tradesman was a customer of the bank, and had overdrawn his account, and for that overdraft the bank agent was liable to the bank. A creditor of the tradesman arrested in the hands of the bank agent the debt due by him to the tradesman. *Question*, Whether the agent had a right of retention in respect of cautionary obligation, and therefore whether the arrestment was good?

John Sinclair, a flesher in Inveraray, being indebted to James M'Pherson, farmer, Kilblaan, accepted a bill of exchange drawn on him by M'Pherson for £34, 6s. 9d., which ran as follows:—

“£34, 6s. 9d. Inveraray, 21st Aug. 1882.

“One month after date pay to me or my order, within the National Bank of Scotland (Limited) here, the sum of Thirty-four pounds, 6s. 9d. sterling, value received.”

The bill was presented for payment, but not paid. It was then protested for non-payment, and noted by a notary-public as follows—“24th November 1882, A. M., N. P.” The extract registered protest bore, however, as the date of protesting the bill, not, as in the noting, the 24th November (which was a Sunday), but the 25th. Under this extract registered protest M'Pherson used arrestment to the amount of £36 sterling in the hands of Q. M. Wright, agent for the Union Bank at Inveraray, where Sinclair had an account. He thereafter raised this action of furthcoming against Wright as arrestee and Sinclair as common debtor to obtain the sum arrested, stating that the common debtor supplied goods to the arrestee and his family, and that the arrestee was indebted to him (the common debtor) to the amount of the sum arrested. Wright's defence was twofold:—(1) That the protest was not in conformity with the noting on the bill, and was invalid. The noting on the bill was dated 24th November 1882. The diligence following on that protest was inept and illegal. (2) He explained that at the date of the arrestment he owed nothing to the common debtor; that at that date the common debtor had overdrawn his account kept with the Union Bank of

Scotland's branch at Inveraray, which was under his (Wright's) charge as bank agent, to the extent of £39, 4s. 1d.; and he, as agent for the bank, was responsible to the bank for that overdraft; that at the same date the amount standing on the passbook between the common debtor and himself was £25, 15s. 6d., which sum he was entitled to retain, and did retain, as against the larger balance of £39, 4s. 1d., due by the common debtor on his bank account, as above mentioned; that it was quite understood and agreed to between the common debtor and him (Wright) that the balance on the passbook should be set off against the overdraft on the bank account.

The common debtor also defended the action, maintaining that on a proper accounting the pursuer was due him a large sum, and that the bill had been extinguished by payments and counter claims.

The defender Wright pleaded—“(1) The protest founded on being disconform to the materials for the protest noted on the bill is invalid and not entitled to any faith, and the diligence following thereon is inept. (4) This defender being entitled to a right of retention against the common debtor for payment of the balance due by him on his bank account, there was no debt due by this defender to the common debtor which could be attached by the arrestment.”

The Sheriff-Substitute (CAMPION) pronounced this interlocutor:—“Finds (1) that on 15th December 1882 the pursuer James M'Pherson, arrested, conform to extract registered protest, in the hands of the defender Q. M. Wright, all sums of money due by him to the common debtor John Sinclair; (2) that there was admittedly at that date a sum of £25, 15s. 6d. sterling in the hands of Wright, due as per passbook to the common debtor for meat supplied by him; (3) that it is incompetent to set off against that debt for goods supplied a sum due by the common debtor for an overdrawn account to the Union Bank of Scotland, of which the defender Wright is agent; therefore grants decree in favour of pursuer for the sum of £25, 15s. 6d. sterling, together with the expenses of process against the defender Q. M. Wright.”

“*Note*.—The arrestment following upon the extract registered protest is in due form, and it is admitted that there is a sum of £25, 15s. 6d. in the hands of the defender Q. M. Wright, due per passbook to the common debtor John Sinclair.

“Several defences have been set up. The first is against the protest and all diligence that followed thereon, in consequence of the bill having noted upon the face of it 24th September 1882, which was a Sunday. The bill fell due on 21st September, and there is noted on the face of it the third day after the 21st, being the 24th, but all the necessary steps are taken upon lawful and proper days and in proper form. The Sheriff-Substitute therefore repels all objections stated against the bill and extract registered protest. . . .

“There remains then what is really the chief defence to this action stated for the defender Q. M. Wright. Wright is a bank agent, and has allowed the common debtor to overdraw his account to an amount of £39, 4s. 1d. He pleads

that he is personally responsible for this overdraft, and therefore is entitled to set off this private account to the common debtor against that due by the common debtor to the bank. This view the Sheriff-Substitute is unable to entertain. The debts are due under different circumstances and to different persons, and cannot be set off one against another. The defender may have had means of advancing to the common debtor money against the security of the sum due in passbook, but giving him permission to overdraw his account seems scarcely the most appropriate one. No authority has been given to the Sheriff-Substitute for holding that a bank-agent is entitled to set off his own private debts with a client of a bank against that due to the bank by the same client. The Sheriff-Substitute is therefore of opinion that this defence also must be repelled, and the pursuer found entitled to the sum admittedly in the hands of the defender Wright due to the common debtor."

The defender appealed, and argued—(1) The disconformity between the extended protest and the noting on the bill was absolutely fatal to it and the diligence following on it. While the noting might be extended at any time thereafter, it must be extended in a precisely accurate way, and failure to do this rendered it inoperative for the purposes of diligence—45 and 46 Vict. c. 61 (Bills of Exchange Act, 1882), sec. 51, sub-sec. 4; *Barbour v. Newall*, May 23, 1823, 2 S. 328. (2) It was a relevant defence to go to proof that the defender was under cautionary obligation to the bank for the common debtor's overdraft on his bank account, and had therefore a right to retain the money due on his own private account with the latter for goods supplied until he should be relieved of the overdraft for which he was responsible—More's Lecture on the Law of Scotland, vol. i., pp. 402, 403, and 406; *Town of Aberdeen v. Strachan*, July 1, 1709, M. 2570; *Brodie v. Wilson*, June 27, 1837, 15 S. 1195; *Christie v. Keith*, June 29, 1838, 16 S. 1224; *Erskine*, iii. 6.

The pursuer replied—(1) The fact that a wrong date on the noting was changed to a correct one in the extract registered protest could not render inept the diligence following on the latter. There was nothing in the Bills of Exchange Act 1882 to bring about such a result. (2) The second contention of the defender was irrelevant. There could be no right of retention, for there was no *concursum debiti et crediti*. The defender's debt on which arrestment was used was a private one, and could not be set off against the common debtor's overdraft at the bank. The defender was only the agent of the bank, and his position was quite distinguishable from that of an ordinary cautioner. There was no allegation that the common debtor was unable to pay the debt to the bank.

At advising—

LORD YOUNG—There are two questions presented in this case which have been fully and ably argued. The first is—Whether the arrestment used in the hands of Mrs Wright was a good one? and depends upon the warrant of arrestment, which was an extract registered protest, which bears that a bill of exchange for £34, 6s. 9d. on which Mr Sinclair was debtor was duly protested

for non-payment on the 25th September 1882, and so is disconform to the noting of the 24th. I am of opinion that that is fatal to the warrant on which the arrestment proceeded, and therefore that it is fatal to this action of furthcoming; I therefore propose that we should sustain the first plea-in-law for the defender, which runs thus—“The protest founded on being disconform to the materials for the protest noted on the bill, is invalid and not entitled to any faith, and the diligence following thereon is inept.” The bill on the face of it exhibits a noting on the 24th of September 1882. Though noting will warrant the extending of the protest—or the “producing” of it as I think it has sometimes been called—at any date thereafter, the extended protest must always be conform to the noting on the bill which is its warrant. But here the extended protest bears that the bill was protested on the 25th September, and so is disconform to the noting of the 24th, and that is sufficient for the decision of the case without further inquiry.

The other question is one of relevancy, and we need not decide it—indeed, it would be plainly superfluous to do so, inasmuch as if your Lordships accede to the proposal I am making we shall decide the case itself on a question sufficient for its decision without further inquiry. The question is, Whether Wright was entitled to retain against Sinclair in respect of his cautionary obligation to the bank? I have several times indicated that my impression on the question is in conformity with the opinion of Professor More, to which we have been referred, and who is of opinion that a cautioner may retain against the party for whom he acts as cautioner until he is relieved of his obligation. I assume that he is a cautioner for an existing and past-due debt, for in the case of a future or a contingent debt there might not, and probably generally would not, be such a right of retention unless under peculiar circumstances—such as the person guaranteed being *vergens ad inopiam* or bankrupt, or in labouring circumstances. But in the case of a cautionary obligation for a debt presently due, my opinion is in conformity with that of Professor More, that there is a right to retain which cannot be withheld until relief is given, and, I further think, in accordance with the decision in the case of *Brodie v. Wilson*, that where there is a right of retention against a debtor, there is one against an arresting creditor of his. But although I have indicated my opinion on the question, I repeat that it is unnecessary to decide it where we have already a question on which we are prepared to decide the case without inquiry.

LORD CRAIGHILL—I concur in thinking that the defender's first plea-in-law ought to be sustained. That is enough for the decision of the case, but I may say that on the second question submitted to us I should probably, and almost certainly, incline to the opinion expressed by Lord Young were it necessary to decide it.

LORD RUTHERFURD CLARK—I am satisfied that the arrestment was not validly laid on, and for that reason I am content to sustain the first plea-in-law for the defender without saying more.

The LORD JUSTICE-CLERK was absent.

The Court pronounced the following interlocutor:—

“Recal the judgment of the Sheriff: Sustain the first plea for the defender Wright, and assolvie him from the conclusions of the action.”

Counsel for Appellant—Guthrie Smith—Shaw.  
Agent—John Gill, S.S.C.

Counsel for Respondent—Lang—Ure. Agent  
—Thomas Carmichael, S.S.C.

Wednesday, May 20.

## SECOND DIVISION.

[Sheriff of Lanarkshire.

MURRAY v. STEEL & SONS.

*Process—Appeal—Removal to Court of Session—Employers Liability Act 1880 (43 and 44 Vict. c. 42), sec. 6.*

The pursuer brought an action in the Sheriff Court against the defenders, his employers, concluding for £1000 in respect of bodily injury sustained, as he alleged, owing to their fault. On the record being closed he appealed for jury trial. The verdict was for pursuer, damages £150. On motion to apply the verdict with expenses, the defenders moved that only Sheriff Court expenses be allowed, on the ground that pursuer had (as was admitted) been successful on the grounds introduced by the Employers Liability Act, and the Legislature by providing that all actions under that Act should be brought in the Sheriff Court, contemplated their decision by that tribunal. The Court overruled the defenders' motion, and applied the verdict with the usual expenses applicable to an appeal for jury trial.

Counsel for Pursuer—Rhind—Gunn. Agent  
—R. Stewart, S.S.C.

Counsel for Defender—Jameson—Ure. Agents  
—Cuthbert & Marchbank, S.S.C.

Wednesday, May 20.

## SECOND DIVISION.

[Lord Kinnear, Ordinary.

DOIG AND ANOTHER v. BUCHAN.

*Parent and Child—Bastard—Aliment.*

A woman gave birth in 1851 to a bastard child. The alleged father, while paying a share of her inlying expenses, refused to acknowledge the paternity of the child, and she supported it entirely herself till 1857, when they entered into an agreement, by which she renounced all claims on him for past aliment of the child, and he acknowledged the paternity, and promised in future to support the child, so far as he was able, till it could support itself. He entirely failed to implement this agreement, and in 1884 she raised an action against him for his share of the child's aliment at the rate of £8 per annum from the

date of its birth. The Court awarded £40 as the amount due in the circumstances by him to her from the date of the agreement till 1865, when the child attained minority.

*Father's Offer to Provide Suitable Home for Bastard Child—Aliment.*

*Observations (per Lord Young)* as to the effect which the rejection of the father's offer to provide a suitable home for his bastard child has in extinguishing the mother's claim on him for the child's aliment.

Margaret Law, who was formerly a domestic servant, on the 19th May 1851 gave birth to an illegitimate male child, of which she alleged that Walter Buchan, market gardener at Muirhouses, Linlithgow, was the father. The latter refused at the time to acknowledge the paternity, and she alone continued to support the child herself till 1857. In August of that year, however, they executed a deed of agreement and discharge, in which she renounced and discharged all claims against him for bygone aliment of the child, or for repayment of any money disbursed by her for the maintenance, clothing, and upbringing of the child; in consideration of which, and, on the other part, he thereby acknowledged the child as his son, and engaged and promised thenceforth to aliment and support the child, so far as he might thereafter be able to do so, while the child was unable to earn his own subsistence. He did not after the agreement pay anything for the child's aliment. He paid 30s. for inlying expenses. The child attained minority on 19th May 1865. The mother in November 1873 married John Doig, surgeon at Bathgate, and with consent of her husband, in 1884, raised this action against Buchan to have him ordained to pay the sum of £152, 18s. 5d., as the balance of inlying expenses attending the birth of the child, and aliment at the rate of £8 per annum from the date of the birth until the child arrived at minority on 19th May 1865.

In defence the defender stated that he had never admitted that he was actually the father of the child, and he made no such admission now. As to aliment prior to the agreement, he founded on the discharge. He stated that in 1857 he had been rendered incapable of regular work through his hand being shattered by the bursting of a gun, and was unable till the winter of 1859 to resume his employment; that in 1880 he became, for the first time after his injury, able to contribute towards the aliment of the child; that in and about that year he made offer to the pursuer to take custody of and maintain the child, which was then about nine years of age, and to aliment him in family with himself, and also offered to have the child bound as an apprentice to any trade which the pursuer might choose; that these offers were declined by the pursuer, who absolutely declined to part with the boy. “In respect of said offers and refusal, the defender's liability to contribute anything towards the support of the child ceased and determined; and this was well understood and acquiesced in by the pursuer.”

He also stated that for nearly a year before he offered to take the child the boy was working in the pottery works at Bo'ness, and earning about a shilling a-day; that he was always a strong, healthy lad, and was able to earn his own subsistence from an early age; that he (defender)